In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-580

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
PETITIONERS

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On December 12, 1970, petitioners brought this class action in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment and an injunction against alleged military surveillance of their activities and the keeping of records relating thereto.

After a hearing in which numerous witnesses testified concerning the Army's activities in gathering

intelligence relating to possible civil disturbances, the district court on January 5, 1971, denied the relief sought and dismissed the complaint (Pet. App. 11a-15a). The court of appeals affirmed in an opinion filed May 23, 1972 (Pet. App. 5a-10a). Following this Court's decision in *Laird* v. *Tatum*, 408 U.S. 1, the court of appeals on July 12, 1972, denied a petition for rehearing (Pet. App. 1a-3a).

1. Petitioners contend that the Army's information-gathering activities inhibited recruitment efforts of petitioner organizations, deterred attendance at organization meetings, and harassed individual petitioners, all in violation of First Amendment rights of free speech and assembly. Last term, this Court held in *Laird* v. *Tatum*, 408 U.S. 1, that a similar claim did not constitute a justiciable case or controversy. The court below held, in an opinion rendered before this Court had decided *Tatum*, that the substantial identity of issues, parties, and evidence as between that case and the present case, made it desirable that petitioners' claims be asserted in the then-pending *Tatum* action, and that this Court's ruling in *Tatum* would be dispositive of the instant litigation.

In denying the petition for rehearing subsequent to the decision in *Tatum*, the court of appeals correctly found the distinctions advanced by petitioners were insubstantial, and that *Tatum* is dispositive of the instant case. The three distinctions urged here and below are: first, that the *Tatum* plaintiffs were not actually "aggrieved," whereas in this case it was alleged that the organizational petitioners were dis-

rupted and the individual petitioners harassed; second, that *Tatum* involved only the collection of public information, while this action involved the collection of "private" information as well; and third, that information collected by the Army in this case was actually distributed to both governmental and non-governmental sources. (A final distinction urged below was that this case involves only a region, whereas *Tatum* involved the entire country.)

In holding that these distinctions were not significant, the court below stated:

> The rationale of the [*Tatum*] opinion of the Supreme Court is fairly applicable to regional as well as national activities; moreover, the opinion contains several references to the exchange of information between military and non-military sources. The third and fourth points must therefore be rejected. The other two points are not, however, explicitly covered by the opinion of the majority. We are nevertheless persuaded that they were implicitly rejected by the Court.
>
> Basically, the harm to the plaintiffs-appellants * * * was the fact that some of them had been the targets of military surveillance. The dissenting opinions in *Tatum* indicate that similar harm was disclosed by that record. Necessarily, therefore, the Court held that such harm was not actionable. [Footnote omitted.] (Pet. App. 2a.)

This analysis is sound and, as the court below held on rehearing, the present action is governed by this Court's decision in *Tatum*.

2. Furthermore, the equitable relief sought by petitioners was properly denied. Before mid-1970, the principal mission of the 113th Military Intelligence Group was the collection of information which might be needed in connection with military efforts to quell civil disorders (Tr. 139).[1] Files were maintained on "organizations or individuals who had a high potential for creating or initiating civil disturbance" (Tr. 141), or whose assistance would be especially valuable in the event of such a disturbance to help "put a damper on any violence" (Tr. 538).

Such files fell far short of containing the dragnet of personal and private information which allegedly was being collected by the Army (Complaint, pars. 7, 10, 12; Pet. 6; Tr. 204). For example, the file maintained on petitioner Jay Miller consisted only of news clippings, and no longer exists (Tr. 531-532). A file maintained on Jesse Jackson as a person to be contacted to discourage violence consisted only of news articles and information from nonmilitary governmental sources (Tr. 250, 316, 538). This file was destroyed in 1970 (Tr. 539). The A. A. Raynor file used only information obtained from newspapers and the like (Tr. 321, 441). Harry De Zutter's file, composed solely of news articles written by him, was destroyed in June 1970 (Tr. 200, 534-535). The

---

[1] "Whenever there is an insurrection in any state against its government, the President may, upon the request of its legislature or of its governor * * * use such of the armed forces, as he considers necessary to suppress the insurrection." 10 U.S.C. 331.

files on petitioner American Civil Liberties Union and its executive director, Jay Miller, have also been destroyed.[2]

The process by which the information comprising such files was collected was the subject of detailed testimony in the district court. Principally, the data were collected from newspapers and other publications, and from reports received from civilian government agencies and from state and local police (Tr. 156, 531-547).[3] No so-called "covert" surveillance of civilians was conducted (Tr. 144, 156). The information collected by the Army was furnished only to the military, to local and state police departments, and to certain investigative government agencies (Tr. 179).

---

[2] A brief characterization of the ACLU is still contained in an encyclopedic listing of various organizations, including the Knights of Columbus, Masonic Order, B'nai B'rith, and others (Tr. 542-543). Files on petitioners Sherman and Cousins are being maintained (Tr. 540) because of their association with Veterans for Peace, an organization whose activities, according to the testimony below, are directed against the Army (Tr. 344-345, 535-536), and are therefore still of concern to it.

[3] Even the petitioners' chief witness, John Michael O'Brien, had no personal knowledge of any intelligence-gathering activities beyond clipping newspaper articles, observing public events, and asking other persons questions about the subject on whom a file was maintained (Tr. 183-194), except for one or two isolated, unauthorized incidents (*e.g.*, Tr. 209-211, 216-217). O'Brien testified that he never personally obtained any intimate, private information concerning any individual (Tr. 204).

After the complaint in the *Tatum* case had been dismissed but before the present action was brought, an Army directive in June 1970 took the 113th Military Intelligence Group "out of the civil disturbance business" (Tr. 133). It ordered the destruction of the bulk of files formerly maintained, except for "a few" which were deemed "of legitimate concern to the Army" (Tr. 136-137). Pursuant to that directive, the 113th has engaged in no civil disturbance activities since June 9, 1970, and virtually all of the files herein complained of have been destroyed. Petitioners instituted this suit in December 1970, and after a hearing the district court denied declaratory and injunctive relief, noting that the Army had already discontinued the practices in question and was purging its files. Since the results petitioners sought in this litigation had been substantially achieved, the denial of equitable relief was within the district court's discretion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1973 490-028 360